SUPREME COURT, U. S.

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In the Supreme Court of the United States

OCTOBER TERM 1967

No. 569

CHINA UNION LINES, LTD., a corporation,
Petitioner,

vs.

STATES STEAMSHIP COMPANY, a corporation,
Respondent.

Brief in Opposition to Petition for Writ of Certiorari

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STATES STEAMSHIP COMPANY, a corporation,
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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Does the doctrine of avoidable consequences require the owner of a collision-damaged vessel to have repairs performed abroad, rather than in the United States, when to do so would (1) be contrary to national maritime policy, (2) place the vessel owner in breach of its Government subsidy contract, and (3) result in the imposition of a 50 per cent ad valorem duty on the cost of foreign repairs?

STATUTES INVOLVED

This case involves, in addition to the statute set out in the petition for certiorari, R.S. § 3114, which provides in pertinent part:

> The equipments . . . purchased for, or the repair parts or materials to be used, or the expenses of repairs made in a foreign country upon a vessel documented under the laws of the United States to engage in the foreign or coasting trade . . . shall, on the first arrival of such vessel in any port of the United States, be liable to entry and the payment of an ad valorem duty of 50 per centum on the cost thereof in such foreign country; and if the owner or master of such vessel shall willfully and knowingly neglect or fail to report, make entry, and pay duties as herein required, such vessel, with her tackle, apparel, and furniture, shall be seized and forfeited. . . . (R.S. § 3114, Ch. 356, Title IV, § 466, 42 Stat. 957 (1922), *as amended,* 19 U.S.C. § 257 (1964).)

REASONS FOR DENYING THE WRIT

I. The Ninth Circuit Correctly Decided That Respondent's Decision to Accomplish Repairs to the Illinois in the United States Was Proper.

A. REASONABLENESS IS THE STANDARD BY WHICH THE PROPRIETY OF DAMAGE COSTS IS MEASURED.

Petitioner asserts that "unreasonable damage costs are not recoverable under the general maritime law" and that, accordingly, "an injured party has an obligation not to exaggerate but to do everything possible to minimize his damages." (Pet. 5.) The conceptual inconsistency between these assertions is apparent, since there is clearly no equation between what is reasonable and what is possible. Preliminarily, then, it is necessary to correct petitioner's maladroit statement of the rule of damages which it contends is applicable to this case. A lucid statement of this rule and an illustration of its application is found in the decision in *Ellerman Lines, Ltd. v. The President Harding,*

288 F.2d 288 (2d Cir. 1961). In that case two vessels were in collision. On the basis of preliminary information concerning the extent of the damage to the vessel and the consequent hazard to the goods which she carried libelant's personnel made special arrangements for the immediate discharge of certain portions of her cargo, the cost of which was higher than that which would have been incurred had the vessel awaited her regular turn in berth. Although information subsequently became available which indicated that immediate discharge was not necessary the plan was nonetheless carried through. The district court awarded the cost of discharge as part of libelant's damages. On appeal the sole issue raised by respondent was the propriety of the allowance of this item. In holding that under the circumstances libelant's action was proper and that the award was justified Judge Friendly made the following pertinent observations concerning the so-called obligation to minimize damages:

> "It is often said . . . that a tort plaintiff has a 'duty to mitigate damages.' This form of statement has been criticized, . . . probably rightly so since a plaintiff assuredly has no 'duty' in the Hohfeldian sense of the correlative of a right, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, 23 Yale L.J. 16, 30-32 (1913). The formulation now fashionable is that the defendant is not liable for 'avoidable consequences.' American Law Institute, Restatement of Torts, § 918; McCormick, Damages (1935), p. 128, 2 Harper & James, The Law of Torts (1956), § 25.4. Perhaps as good a way to state the rule as any is that a tort defendant is not liable for consequences preventable by action that reason requires the plaintiff to take; per contra *if the plaintiff takes such action within the range of reason, the defendant is liable for further damages resulting therefrom.* . . .
>
> ". . . It is not fatal to recovery that one course of action, reasonably open but not followed, would have

> avoided further injury whereas another, also reasonable and taken, produced it. 'If a choice of two reasonable courses presents itself, the person whose wrong forced the choice cannot complain that one rather than the other is chosen.' McCormick, supra, at p. 134. The standard of what reason requires of the injured party is lower than in other branches of the law." (288 F.2d at 289-90.) (Emphasis added.)

Implicit in the decision of the court below is the holding that under the circumstances the decision by respondent to have repairs to the *Illinois* performed in the United States rather than abroad was a reasonable one.

B. THE DECISION TO REPAIR IN THE UNITED STATES WAS REASONABLE.

In enacting the Merchant Marine Act, 1936, Congress declared it "to be the policy of the United States to foster the development and encourage the maintenance of . . . a merchant marine." (Merchant Marine Act, 1936, § 101, ch. 858, § 101, 49 Stat. 1985, 46 U.S.C. § 1101 (1964).) Competition from foreign merchant marines was and remains the chief obstacle to the implementation of this policy. To enable American steamship companies to compete Congress, *inter alia,* passed legislation providing for the payment of an operating differential subsidy through contracts between the Government and properly qualified domestic steamship operators. (*Id.* § 601, ch. 858, § 601, 49 Stat. 2001, *as amended,* 46 U.S.C. § 1171 (1964).) In so doing Congress provided that "every contract for an operating-differential subsidy . . . shall provide . . . that . . . the [steamship] operator shall perform repairs to subsidized vessels within the continental limits of the United States, except in an emergency."*

*Petitioner has abandoned the specious argument which it advanced in the court below to the effect that the repairs made to the *Illinois* were of an "emergency" nature and that foreign repair was therefore permissible. (*See* Appellant's Opening Brief, p. 69.)

(*Id.* § 606(7), ch. 858, § 606(7), 49 Stat. 2004, *as amended*, 46 U.S.C. § 1176(7) (1964).) (The purpose of this provision is obvious: if the United States is to have a viable and independent merchant marine, there must be domestic shipyards capable of maintaining it. Protection from foreign competition is thus needed, and the requirement that subsidized American vessels perform repairs in the United States is one means of affording such protection.)

There is no dispute that respondent here had contracted with the Government for the subsidy authorized by Congress and that the contract contained the required stipulation concerning the performance of repairs in the United States. (*See* Pet. 4.) Petitioner in effect argues that the court below interpreted the relevant provisions of the Merchant Marine Act, 1936 in a manner which abrogates the rule of avoidable consequences. (Pet. 5-7.) This argument neatly circumvents the only issue raised by the avoidable consequences doctrine: Did respondent act unreasonably in accomplishing repairs in the United States, in view of its contract and of the broad purpose of the Merchant Marine Act, 1936? It is apparent that this question must be answered in the negative. If respondent had accomplished repairs abroad, it would have contravened a clearly expressed policy of Congress and breached its own Government contract. That such a breach is viewed by the Government as a serious one is shown by section II-30 of the standard form subsidy contract which provides:

> II-30. *Events of Default.* The following shall constitute events of default under this agreement:
>
> . . . .
>
> (f) Failure by the Operator to comply with any applicable provision of the [Merchant Marine] Act . . . . (Reprinted in Pike & Fischer, Shipping Regulation, Current Service Vol. 3, pp. 160:123-160:124.)*

*In 1964 the Maritime Administration proposed a rule which would have "determined that repairs performed foreign . . . in

What consequences would have ensued from a breach by respondent of its subsidy contract is a moot question, but, in any event, "no one is obliged to take chances in the interest of one who has wronged him." (*Pan-American Petroleum & Transp. Co. v. United States,* 27 F.2d 684, 685 (2d Cir. 1928).)

There was still another factor which influenced respondent's decision to repair in the United States: The cost of foreign repairs would have been subject to an ad valorem customs duty of 50 per cent. (R.S. § 3114, ch. 356, Title 10, § 466, 42 Stat. 957 (1922), *as amended,* 19 U.S.C. § 257 (1964).) The effect of the cited section (quoted *infra* at p. 2) is such that if the cost of foreign repairs exceeds 66⅔ per cent of the cost of comparable repairs in the United States, the imposition of the customs penalty will result in foreign repairs costing more than domestic repairs. For example, in the present case the cost of repairing the *Illinois* in the United States was approximately $40,000. If the cost of foreign repairs had been $26,800, the 50 per cent customs duty would have brought the total cost of foreign repairs to $40,200. Presumably, we would then find petitioner contending that repairs should have been performed in the United States rather than abroad. In any event, the existence of the customs penalty lends additional, if unneeded, weight in support of the reasonableness of respondent's decision to repair in the United States because it substantially reduces (and could altogether eliminate) whatever cost differential may exist between foreign and domestic repairs.

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violation of Section 606(7), Merchant Marine Act, 1936, as amended, and . . . the Company's operating-differential subsidy agreement, shall be subject to the following:

> "(1) An amount equal to the total cost . . . of said foreign repairs . . . shall be deducted from the company's total operating-differential subsidy otherwise accrued." (29 FR 3158 (1964).)

II. The Decision Below Does Not Conflict with the Decision of This Court in Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927).

In further reiteration (Pet. 8) of its unsupported contention that the cost of repairs made in the United States was an improper measure of damages petitioner relies on the decision in *Robins Dry Dock & Repair Co. v. Flint,* 275 U.S. 303 (1927), where Justice Holmes held that time charterers could not recover from a dry dock company for damages and delay in use of a vessel as a result of injury to the vessel's propeller during the semi-annual dry-docking required by the charter party. It is apparent that respondent's position is not analogous to that of the time charterers in *Robins,* as petitioner suggests, but rather to that of the vessel owner. It is undeniably the law that a recoverable item of collision damage is the loss of hire suffered by a vessel in collision whose charter is interrupted. (*United States v. Panama Transp. Co.,* 174 F. Supp. 592 (S.D.N.Y.), *aff'd per curiam,* 268 F.2d 739 (2d Cir. 1959).) Moreover, the question decided in *Robins* was not the amount of damages to which time charterers were entitled, but whether their libel against the dry dock company stated a cause of action.* Finally, it is apparent that there is little similarity between a Government contract executed pursuant to, and designed to implement, national maritime policy and an ordinary, private commercial contract. The decision in *Robins* is thus clearly inapposite to the question raised here by petitioner.

Petitioner also relies upon *Hadley v. Baxendale,* 9 Ex. 341, 156 Eng. Rep. 145 (1854), and then is forced to concede its inapplicability to the present case because there is "no

*"The question is whether respondent [time charterers] have an interest protected by the law against unintended injuries inflicted upon the vessel by third persons who know nothing of the charter." (275 U.S. at 308.)

contractual relationship between the parties. . . ." (Pet. 10, n. 2.)* Contrary to the rule expressed in that decision (which limits contract damages to those within the reasonable contemplation of the parties), the rule is well established in tort cases that even though the tort-feasor neither foresaw nor should have foreseen the extent of damage caused the injured party this fact does not prevent him from being liable for the full amount of the injured party's damages. (See Restatement (Second) of Torts §§ 435, 454 (1965).)

III. The Question Presented Does Not Merit This Court's Attention.

None of the criteria for the granting of certiorari set forth in Rule 19 of this Court's Rules is satisfied here. Viewed in any reasonable perspective the question whether the rule concerning avoidable consequences should be applied so as to preclude the award of part of respondent's damages is not a matter of such national, maritime or commercial significance as to merit the attention of this Court. The question is a simple, narrow one which was adequately and correctly dealt with by the courts below. It is not a

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*Petitioner also cites *Weyerhaeuser S.S. Co. v. United States*, 372 U.S. 597 (1963), for the proposition that "the full scope of the admiralty rule of damages must prevail over contrary provisions and the absence of a contractual relationship between the parties is not conclusive." (Pet. 9, n. 2.) In *Weyerhaeuser* this Court held that a private vessel owner was entitled to recover as part of collision damages from the United States sums paid in settlement of a personal injury claim made by a Civil Service worker employed on the Government vessel involved, notwithstanding the fact that the employee had received compensation under the Federal Employee's Compensation Act, stating that "the full scope of the divided damages rule must prevail over a statutory provision which, like the one involved in the present case, limited the liability of one of the shipowners with respect to an element of damages incurred by the other in a mutual fault collision." (372 U.S. at 603.) The point decided in *Weyerhaeuser* has no application here, even as distorted by petitioner.

question of such complexity or importance that the aid of this Court should be required.

CONCLUSION

The arguments presented by petitioner not only are clearly lacking in substantive merit, but also fail to pose an issue of importance sufficient to justify the granting of a writ of certiorari. The petition should therefore be denied.

San Francisco, California
September 30, 1967

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, GRAYDON S. STARING, certify as follows:

I am a member of the Bar of the Supreme Court of the United States. I represent respondent States Steamship Company in the above entitled matter, in whose behalf service of the foregoing Brief has been effected as herein stated.

I certify that on or before September 30, 1967, I served the foregoing Brief in Opposition to Petition for Writ of Certiorari by service of three (3) copies upon the attorney for Petitioner, by mailing the same at San Francisco, California, postage prepaid, first class mail, as follows:

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